DELTA ENTERPRISES SDN BHD & ORS

v.

ASIA COMMERCIAL FINANCE (M) BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: Q-02-541-96]
24 DECEMBER 2004

CONTRACT: *Loan - Interest payments - Default - Whether service of monthly interest mandatory - Whether failure to pay interest an event of default under agreement - Whether proper demand made on guarantors*

The 1st appellant company defaulted in the servicing of monthly interests of a loan facility taken with the respondents in respect of a development project. As a result thereof, the respondents withheld the drawdown of the balance of the loan sum. The dispute between the parties led the respondents to commence an action against the appellants in the High Court wherein the respondents claimed for a shortfall sum. The 1st appellant counterclaimed for damages for the breach of the terms of the relevant letter of offer and the loan agreement. The 2nd and 3rd appellants who were directors of the 1st appellant were sued as guarantors for the 1st appellant. The learned trial judge found in favour of the respondents. Hence, this appeal by the appellants. The issues were: (1) whether the service of the monthly interest was mandatory; (2) whether the failure to pay interest was an event of default under the loan agreement entitling the respondents to withhold the said drawdown; and (3) whether a proper demand was made on the guarantors.

Held (dismissing the appeal)
Per Nik Hashim JCA delivering the judgment of the court:

[1] The words in s. 8.01 of the loan agreement were clearly expressed and unambigious. The word "shall" appearing in s. 8.01 was clearly mandatory in terms. Therefore strict compliance with its provision was called for as the parties themselves agreed to the terms which were then embodied into the loan agreement. Accordingly, it was mandatory for the 1st appellant to service monthly interest in arrears. (p 507 f-g)

[2] The learned judge was right in finding that the failure to service the interest on a monthly basis came within the scope of events of default under s. 16.01 of the loan agreement. The words "any sum due" in s. 16.01(1)(a) meant to include interest. Such being the case, the respondents' withholding or delay in releasing the drawdown was justified. The respondents did not refuse to allow the drawdown but merely required the conditions preceding it to be fulfilled before release. That course of action was prudent and which every banker and lender would adopt to protect their interests. In the event, the respondents were not in breach of the letter of offer and the loan agreement. (p 509 c-d)

[3] The 2nd and 3rd appellants did not deny receipt of the demand letters. They did not give evidence at the trial. Since the letters of demand were sent to them by prepaid post to their addresses pursuant to cl. 10 of the letter of guarantee, the said letters were considered properly served on them. Hence, the 2nd and 3rd appellants were liable as guarantors to the 1st appellant. (p 511 f-g)

[4] The guarantees by the 2nd and 3rd appellants were given in consideration of the respondents granting the loan facility to the 1st appellant. Since there was no breach of the loan agreement on the part of the respondents, the failure of consideration as alleged by the 2nd and 3rd appellants did not arise. Consequently, there was no basis for the counterclaim. (p 512 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Syarikat perayu pertama telah gagal membayar faedah bulanan bagi kemudahan pinjaman yang diperolehinya dari responden berkaitan satu projek pembangunan. Akibatnya, responden menggantung pengeluaran baki pinjaman tersebut. Pertikaian yang berbangkit telah membawa kepada pemfailan tindakan oleh responden terhadap perayu di Mahkamah Tinggi, di mana responden menuntut jumlah yang telah dikeluarkan perayu. Perayu pertama membuat tuntutan balas menuntut gantirugi kerana kemungkiran terma-terma surat tawaran dan perjanjian pinjaman. Perayu kedua dan ketiga, yang merupakan pengarah-pengarah perayu pertama, telah didakwa sebagai penjamin kepada perayu pertama. Yang arif hakim memutuskan kes dengan memihak kepada responden dan perayu merayu. Isu-isunya adalah: (1) sama ada pembayaran faedah bulanan bersifat mandatori; (2) sama ada kegagalan membayar faedah merupakan perbuatan kemungkiran di bawah perjanjian pinjaman yang memberi hak kepada responden untuk menggantung pengeluaran; dan (3) sama ada satu tuntutan yang teratur telah dibuat terhadap penjamin-penjamin.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Perkataan-perkataan di dalam s. 8.01 perjanjian pinjaman terakam dengan jelas tanpa menonjolkan sebarang kekaburan. Perkataan "shall" yang termaktub pada s. 8.01 juga bersifat mandatori. Maka itu, kepatuhan ketat kepada peruntukan tersebut adalah termesti, memandangkan pihak-pihak telah bersetuju dengan terma-terma yang kemudian diperturunkan ke dalam perjanjian pinjaman. Dengan itu juga, ianya adalah mandatori bagi perayu pertama untuk membayar faedah bulanan tertunggak.

[2] Yang arif hakim betul apabila mendapati bahawa kegagalan membayar faedah bulanan dirangkumi oleh skop perbuatan kemungkiran di bawah s. 6.01 perjanjian pinjaman. Maksud perkataan "any sum due" dalam s. 6.01(1)(a) adalah meliputi faedah. Dalam keadaan sedemikian, penggantungan atau penangguhan pengeluaran oleh responden adalah berjustifikasi. Responden tidak menahan terus pengeluaran tetapi hanya menuntut supaya syarat-syarat pengeluaran dipatuhi dahulu. Tindakan yang diambil responden adalah wajar dan adalah tindakan yang akan diambil oleh setiap peminjam bagi menjamin kepentingan mereka. Responden dengan itu tidak memungkiri surat tawaran mahupun perjanjian pinjaman.

[3] Perayu kedua dan ketiga tidak menafikan penerimaaan surat tuntutan. Mereka juga tidak memberi keterangan pada perbicaraan. Oleh kerana surat tuntutan telah dikirim melalui pos berbayar ke alamat mereka seperti yang tertera di kl. 10 surat jaminan, surat-surat tersebut dianggap sebagai telah disampaikan kepada mereka. Perayu kedua dan ketiga dengan itu adalah bertanggungan sebagai penjamin kepada perayu pertama.

[4] Jaminan oleh perayu kedua dan ketiga diberi sebagai balasan kepada pemberian kemudahan pinjaman oleh responden kepada perayu pertama. Oleh kerana perjanjian pinjaman tidak dimungkiri oleh responden, soal kegagalan balasan seperti yang diungkit oleh perayu kedua dan ketiga tidak berbangkit. Ianya mengikut bahawa tuntutan balas adalah tidak berasas.]

Case(s) referred to:
Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors [1993] 2 CLJ 495 SC ***(dist)***
Boonsom Boon Yanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
Gopal Das & Anor v. Sri Thakurji & Ors AIR [1943] PC 83 ***(refd)***
Lloyd v. Lloyd [1837] 2 My & Cr 192 ***(refd)***
Malayan Banking Bhd v. Dr Betharajoo Krishnasamy [2000] 3 CLJ 141 HC ***(refd)***
Mat Yassin Dollah v. Ibrahim Hussin & Anor [1996] 4 CLJ 395 HC ***(refd)***
Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 MLJ 610 ***(foll)***

Other source(s) referred to:
Chitty on Contracts, 25th edn, vol 1, para 766
Sarkar's Law of Evidence, 15th edn, p 1075

For the appellants - Lee Chuan Eng; M/s Ee & Lim
For the respondents - Stanley Eddy; M/s Battenberg & Talma

[Appeal from High Court, Miri; Suit No: KG 115-1990]

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim JCA:

Background

This appeal came up before us on 27 September 2004. At the conclusion of arguments for the appellants we found it unnecessary to call upon the respondents for a reply and therefore dismissed the appeal with costs and ordered the deposit be paid towards the account of taxed costs. We now give our reasons.

The brief facts of this case are as follows. The 1st appellant, intending to construct 10 units of 4-storey shophouses on lots 247 to 256 section 49 Kuching Town Land District (the project land) which was then together with 4 other parcels of land (the other lands) charged to a bank, applied to the 1st respondent for a loan facility to finance the purchase price of the said lands and the construction cost. Following the application and subsequent negotiation between them the respondents through the 1st respondent by its letter of offer dated 3 May 1985 (the offer) offered a fixed loan of RM5.2 million to the 1st appellant to be disbursed as follows:

(i) RM2.5 million to be released to the chargee for the redemption of the titles to the project land and the other lands;

(ii) RM600,000 to be paid to the vendor of the project land in settlement of the purchase price;

(iii) RM700,000 to be released to the 1st appellant for the costs of the construction of the said shophouses;

(iv) RM1.4 million to be released progressively against 60% of the architect's certificate of works done on the project land.

Legal documents were prepared and executed by the parties namely, the Loan Agreement dated 17th June 1985, Memoranda of Charge covering the project land and the other lands and Letter of Guarantee executed by Kho Kak Siew (an undischarged bankrupt at the time of trial), Kho Kak Soon (2nd appellant) and Kho Kak Hee (3rd appellant).

Thereafter on the application of the 1st appellant, the first drawdown comprising the sums in paras 2(i), 2(ii) and 2(iii) totaling RM3.8 million were released to the 1st appellant.

However, problems between the 1st appellant and the respondents arose in connection with the subsequent drawdowns applied for by the 1st appellant on the RM1.4 million.

The total release and drawdown made to and by the 1st appellant was a sum of RM4,737,239.99 from the loan of RM5.2 million. As at 31 May 1993, the 1st appellant had repaid a sum of RM6,745,172.15 to the respondents. But as early as 1985, the 1st appellant has defaulted in the servicing of the monthly interest.

Consequent upon the 1st appellant's default in servicing of the monthly interest, the respondents withheld the drawdown of the balance of the loan of RM1.4 million.

The dispute between the 1st appellant and the respondents culminated in the action before the learned trial judge. The respondents were claiming to recover from the 1st appellant the sum of RM2,231,213.43 and interests being the shortfall sum after the 1st appellant and the other chargors had redeemed the land titles which had been charged to the respondents. The 1st appellant in turn counterclaimed against the respondents for damages for breach of the terms of the Letter of Offer and the loan agreement. The 2nd and 3rd appellants were sued as guarantors for the 1st appellant.

The learned trial judge gave judgment in favour of the respondents. Hence, this appeal by the appellants.

Before us, learned counsel from both sides relied on their respective written submissions to support their arguments.

Issues

Having perused their written submissions, we found their arguments centered essentially on three core issues that merit our consideration. They are:

(i) whether it was mandatory to service monthly interest as provided in section 8.01 of the Loan Agreement and item 8 of the Letter of Offer dated 3 May 1985;

(ii) whether the failure to pay interest can be considered as an event of default under section 16.01(i)(a) or (b) of the Loan Agreement thus entitling the respondents to withhold drawdown under section 6.02(f) of the Loan Agreement; and

(iii) whether any proper demand had been made on the guarantors.

Findings

With regard to the first issue whether servicing monthly interest under the Loan Agreement is mandatory, it is pertinent to reproduce the relevant sections for our consideration. Section 8.01 provides:

> The Borrower **shall** pay interest on the Advances and on the Loans from time to time outstanding monthly in arrears on each Interest Payment Date at the rates applicable thereto as hereinafter provided as from the respective Drawdown Dates of the Advances the first of such payments to be made at the end of the month in which the first drawdown is made and subsequent payments to be made every one (1) month thereafter. Interest for any period less than a year shall be calculated on the basis of actual days elapsed divided by 365. (emphasis added)

Whereas with respect to late payment section 8.04 states:

> If the Borrower fails to pay any amount in accordance with this Agreement, the Borrower shall pay interest on that amount from the time of default up to the time of actual payment (as well after as before judgment) at the rate of Three per centum (3%) per annum above the Prescribed Rate or at such other rate or rates as the Agent may stipulate from time to time such interest to be chargeable on a daily balance basis until settlement of such sums in default.

And this is what the learned judge said on sections 8.01 and 8.04:

> Having considered the wordings of section 8.01 I am inclined to agree that it is mandatory in nature. And I cannot accept that it can be subject to section 8.04. There is nothing to indicate that. Moreover, I am fortified by item 8 of the Letter of Offer dated 03.05.1985 (Exh. P1, page 1) "(which states: Repayment: servicing of monthly interest in arrears. Full principal and interest repayment or by redemption of titles not later than eighteen (18) months from the date of the first drawdown. The redemption sum shall be $550,000 per unit or proportionate to the total amount outstanding at the time of redemption, whichever is higher.)" It is obvious under item 8 that servicing of the monthly interest in arrears was expected. Even DW1 under cross-examination admitted that as early as 1985 the 1st Defendant was already in breach of the Loan Agreement due to the default in paying the interest on the first release made on the 26.06.1985. In view of such an admission I find it puzzling for DW1 to now say that section 8.01 is not mandatory.

We agreed with the learned judge. It has been accepted that for the construction of commercial documents, such as one in this case, the paramount concern is to discover the intention of the parties from the terms therein contained. *Chitty on Contracts*, 25 edn. vol. 1 at para 766 emphasizes:

> Intention of the parties. The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself: 'One must consider the meaning of the words used, not what one may guess to be the intention of the parties.'

Lord Cottenham LC in *Lloyd v. Lloyd* [1837] 2 My. & Cr. 192, 202 said: "If the provisions are clearly expressed, and there is nothing to enable the court to put upon them a construction different from that which the words import, no doubt the words must prevail." In our view, the words in section 8.01 are clearly expressed and unambiguous that there can be no other construction possible than the one which was held by the learned judge. The word 'shall' appearing in the section clearly supports that section 8.01 is mandatory in its terms (see *Mat Yassin bin Dollah v. Ibrahim bin Hussin & Anor* [1996] 4 CLJ 395; [1997] 2 MLJ 681). Thus, strict compliance with its provision is called for as the parties themselves had agreed to the terms which were then embodied into the Loan Agreement. Accordingly, under the terms of section 8.01 and item 8 of the Letter of Offer, it is therefore mandatory for the 1st appellant to service monthly interest in arrears.

The second issue to consider is whether the failure to service the monthly interest amounts to an event of default under section 16.01 of the Loan Agreement and thereby justifying the respondents to withhold or delay the release of the drawdown from the RM1.4 million.

'Event of default' under section 2.01 (1) is defined to mean any of the events or states of affairs specified in section 16.01 which provides:

"Events of Default"

(1) The Agent may, by written notice to the Borrower declare that the commitments shall be cancelled, whereupon the same shall be cancelled and accrued commitment fee shall become due and payable and/or declare the principal, interest and all other sums payable under this Agreement to be forthwith due and payable, whereupon the same shall become so payable, if:

(a) the Borrower fails to pay any sum due under this Agreement or the charge on due date; or

(b) the Borrower makes default under any other provision of this Agreement or the charge which is not capable of remedy or which, being capable of remedy, is not remedied within 30 days after notice to the Borrower from the Agent requesting action to remedy the same; or

(c) to (i) ...

Whereas Article VI, sections 6.01 and 6.02 provide the conditions precedent for the drawdowns. In particular, section 6.02 sets down the conditions precedent for second and subsequent drawdowns which stipulates:

In addition to the provisions of section 6.01 the several obligations of the Lenders to make their proportion of the Second and Subsequent Drawdowns available shall also be subject to the fulfilment of the following conditions precedent:

(a) to (e) ...

(f) No Event of Default and no event which with the giving of notice and/or lapse of time and/or a determination made under the relevant section would constitute an Event of Default having occured at the date on which the relative Drawdown Notice is delivered to the Agent and at the date of such Advance.

With respect to the second issue, the learned trial judge opined as follows:

> On reading section 16.01(1)(a) and (b) it is my considered opinion that the failure to service the interest on monthly basis comes within the scope of events of default. If therefore there was a default then the plaintiffs (respondents) could rely on section 6.02 in refusing or delaying any releases as what happened in this case. I noted that before finally allowing the first release from the RM1.4 million the outstanding interest had to be paid by deducting from the sum paid. And DW1 testified that he agreed to the deduction …

Thus, to our mind, the learned judge was right in his finding that the failure to service the interest on monthly basis comes within the scope of events of default under section 16.01. We are of the further view that the words 'any sum due' under section 16.01(1)(a) mean to include interest. Such being the case, the 1st appellant's complaint over the withholding or delay in releasing the drawdowns by the respondents was not without justification. The respondents did not refuse to allow drawdowns to be made to the 1st appellant. The respondents merely required fulfillment of conditions of drawdowns before releasing drawdowns to the 1st appellant. That course of action adopted by the respondents was prudent and which every banker and lender would adopt in order to protect their interests. In that event, the respondents were not in breach of the Letter of Offer and the Loan Agreement.

If it was the intention of the parties that there be no need to service the loan by payment of monthly interest in arrears, then the Loan Agreement would surely not have been drawn up and executed in the format as it now exists. If that was the intention, then the whole loan of RM5.2 million would have been released to the 1st appellant and the 1st appellant would only be required to pay the RM5.2 million with interest thereon at the end of the loan period. But that was not the intention or arrangement in the instant case.

Much reliance was placed by the 1st appellant on the Federal Court case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn Bhd & Ors* [1993] 2 CLJ 495 to support its contention that the respondents were in breach of the Loan Agreement when they withheld or delayed in releasing the drawdowns.

In *Bank Bumiputra, supra*, Edgar Joseph Jr SCJ, *inter alia*, that the bank was in breach of contract when it treated the term loan as on demand loan and recalled it prematurely, before its rights accrued. The learned judge also held that if the typescript words and the printed words can be read together and be given a reasonable meaning, the contract of loan is construed as an on demand loan, and the borrower was entitled to some reasonable time to repay.

In this case, there was no evidence that the bank had carried out a final periodical survey and then given MP (the borrower) a reasonable time for repayment before calling the overdraft facility and on this ground also, the bank was in breach of agreement and consequently MP is entitled to damages.

From the foregoing judgment, these facts are distinguishable from the instant case:

(i) in *Bank Bumiputra*, the facility was an overdraft facility; in the instant case it is a term loan, serviceable by monthly repayment of interest and can be recalled if any breach is committed by the borrower and is not remedied or can be recalled at the expiry of the Availability Period;

(ii) in *Bank Bumiputra*, the loan was recalled prematurely; in the instant case, the action to recover the loan was taken on after the Availability Period had lapsed on 31 December 1987 and the 1st appellant had not drawdown or fully utilized the loan before the expiry of the Availability Period;

(iii) in *Bank Bumiputra*, the learned judge at p 86 para D stated that nowhere in exh P2 is it said that the first respondent was required to pay the interest monthly or at any other intervals; in the instant case, by section 8.01 of the Loan Agreement it is unequivocally stated that the 1st appellant was required to pay monthly interest in arrears;

(iv) in the instant case, the action was not one based on a recall of loan prematurely but based on the Loan Agreement whereby the respondents was suing for the shortfall;

(v) in *Bank Bumiputra*, the 1st respondent claimed for loss of profit, exemplary damages and damages paid to third party; these items were proven; in the instant case, no such heads of damages were pleaded and proved.

Thus, from the facts stated above, we are of the view that the ratio decidendi and the facts of the *Bank Bumiputra* cannot be applied to the instant case.

With regard to the 3rd issue, the 2nd and 3rd appellants submitted that there was no proper demand made on them, and as such, they were not liable as guarantors to the 1st appellant. With respect, we were unable to agree with them. In the present case, evidence was adduced that the letters of demand (P1 (p6)) and the AR Cards (P7 and P8) were sent to the 2nd and 3rd appellants prior to the action. Subsequently, the AR Cards with signatures indicating the receipt were returned. These letters of demand and the AR Cards were produced and marked as exhibits. At the trial, learned counsel for the

2nd and 3rd appellants, however, did not raise any objection at all to the mode of proof of P1 (p6), P7 and P8 when they were tendered in evidence through PW2 (see pp 157 to 158 vol. 2 of the appeal record). *Sarkar's Law of Evidence*, 15th edn at p 1075 said:

> Once a document is properly admitted the contents would stand admitted in evidence and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence such a document, no such objection could be allowed to be raised at any later stage of the case or in appeal.

(see also *Malayan Banking Bhd v. Dr Betharajoo a/l Krishnasamy* [2000] 3 CLJ 141).

As such, in our opinion, the learned judge was right in admitting P1 (p6), P7 and P8 as evidence without formal proof of their authenticity having to be established. P1 (p6), P7 and P8 were properly admitted. Therefore, their admissibility in evidence could not now be objected to by the 2nd and 3rd appellants in the appeal. His Lordship Gopal Sri Ram JCA in delivering the judgment of the court in *Boonsom Boon Yanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 referred to the Privy Council's decision in *Gopal Das & Anor v. Sri Thakurji & Ors* AIR [1943] PC 83 at p 87, where Sir George Rankin, when delivering the advice of the Board said:

> Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forth-coming had it been insisted on at the trial.

In this case, the 2nd and 3rd appellants did not deny that they were not in receipt of the demand letters. They did not give evidence at the trial. Thus, since the letters of demand were sent to the 2nd and 3rd appellants by prepaid post to their addresses pursuant to cl. 10 of the Letter of Guarantee, the said letters were considered properly served on them. We therefore agreed with the learned judge that proper demand letters were given to the 2nd and 3rd appellants in line with the decision in *Mok Hin Wah & Ors v. United Malayan Banking Corp. Bhd* [1987] 2 MLJ 610. Hence, by the Letter of Guarantee, they were liable as guarantors to the 1st appellant.

It is worthy of note that the guarantees by the 2nd and 3rd appellants (who were the directors of the 1st appellant) were given in consideration of the respondents granting loan facility to the 1st appellant. Since there was no breach of the Loan Agreement on the part of the respondents, the failure of consideration as alleged by the 2nd and 3rd appellants therefore did not arise. Consequently, there was no basis for the appellants' counterclaims. They were rightly dismissed.

In the event, we made the orders accordingly.